

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

-----X Case No.: 21-22696-shl  
IN RE: . Chapter 11  
.  
HELLO LIVING DEVELOPER . 300 Quarropas Street  
NOSTRAND LLC, . White Plains, New York 10601-4140  
.  
Debtor. . July 12, 2022  
-----X Time: 3:32 p.m. - 4:20 p.m.

**21-22696-shl** Hello Living Developer Nostrand LLC **Ch. 11**  
BENCH DECISION Re: Doc. #45 Motion To Dismiss Case Or  
Alternatively, Motion For Relief From The Automatic Stay

HONORABLE SEAN H. LANE  
UNITED STATES BANKRUPTCY JUDGE

VIRTUAL APPEARANCES (VIDEO-ZOOM.GOV/TELEPHONE):

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I N D E X

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CLARIFICATION AND RECITATION RE JUNE 2, 2022 RULING ON MOTION  
TO DISMISS/ALTERNATIVELY, MOTION FOR RELIEF FROM STAY, DOC #45

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U.S. TRUSTEE'S REQUEST FOR FEES OWED TO BE IN ORDER: 34

DEBTOR'S COUNSEL REAFFIRMS CONSENT TO DISMISSAL: 35

1 (Proceeding commences at 3:32 p.m.)

2 THE COURT: Good afternoon, we're here for the case  
3 of Nostrand Mezz Lender -- I'm sorry, we're here for the case  
4 of Hello Living Developer Nostrand LLC, which is on for a  
5 continued hearing on the motion of Nostrand Mezz Lender LLC to  
6 dismiss the Chapter 11 case, or in the alternative, to lift the  
7 automatic stay.

8 And this hearing today is essentially a sequel to  
9 many hearings we've had before, including the hearing on June  
10 2nd, when the Court heard the motion in the first instance.  
11 And so, let me start as do always with appearances.

12 Let me find out who's here on behalf of the Debtor?

13 MR. FOX (Video): Good afternoon, Your Honor. Leo  
14 Fox, representing the Debtor. And -- and with me on the  
15 telephone is Mr. Karp, a principal of -- of the Debtor; and I  
16 think Mr. Worms is on as well.

17 THE COURT: All right. Good afternoon to you all.

18 MR. KARP (Telephone): Good afternoon, Your Honor.

19 MR. WORMS (Telephone): Good afternoon, Your Honor.

20 THE COURT: Let me -- let me find out who's here on  
21 behalf of the Movant, Nostrand Mezz Lender LLC?

22 MR. MUCHNIK (Video): Good afternoon, Your Honor. I  
23 hope you're feeling better, recovering from COVID. Leo  
24 Muchnik, from Greenberg Traurig; my colleague -- on behalf of  
25 Nostrand Mezz Lender LLC -- and my colleague, Alan Brody's on

1 as well. He's actually in Wyoming right now, so he's just  
2 dialed-in; he's not going to be speaking today.

3 THE COURT: All right. So --

4 MR. MUCHNIK: And I'm not -- I believe -- I'm not  
5 sure if he's on yet, but -- yep. And also with me, is the  
6 principal from Nostrand Mezz Lender, Mr. Jeffrey Simpson.

7 THE COURT: All right. Good afternoon to you all.  
8 And let me find out who's here on behalf of the  
9 United States Trustee's Office?

10 MS. TIAN TIAN (Virtual): Good afternoon, Your Honor.  
11 Tara Tiantian, from the United States Trustee.

12 THE COURT: All right. Good afternoon. And with  
13 that, I think I have all the appearances; but in an abundance  
14 of caution, let me ask if there's anyone who has not yet made  
15 an appearance who wishes to do so at this time?

16 (No audible response)

17 THE COURT: All right. So I think that's the crew.  
18 And so I think consistent with the discussions that we've had  
19 at prior hearings, there had been a -- several hearings on this  
20 motion, and the Court had made a ruling that partially lifted  
21 the automatic stay.

22 The reasons that I set forth at that hearing on June  
23 2nd were fairly -- somewhat abbreviated. And so in the  
24 aftermath of that hearing, and with the passage of more than a  
25 month, the Mezz Lender has been asking for a -- a ruling to

1 allow it to go forward without any limitations as to lift the  
2 stay in all respects, and I scheduled today for that purpose.

3 And so, I did see Mr. Fox's letter that was submitted  
4 dated July 11th, and that I -- I didn't check the docket, given  
5 other things I had going on today, but I assume that's made its  
6 way onto the docket. And with that, I think I am up to date.  
7 And so, I'm ready to go ahead with the bench ruling, unless  
8 there's any preliminary matters that pertain directly to the  
9 bench ruling that need to be addressed first?

10 (No audible response)

11 CLARIFICATION/RECITATION OF BENCH RULING OF JUNE 2, 2022 ON  
12 MOTION TO DISMISS/MOTION FOR RELIEF FROM THE AUTOMATIC STAY

13 THE COURT: All right. Hearing nothing, before the  
14 Court is the motion of Nostrand Mezz Lender LLC, which I'll  
15 call "the Mezz Lender," to dismiss the Chapter 11 case of  
16 Debtor, Hello Living Developer Nostrand LLC, or in the  
17 alternative, to lift the automatic stay. (See motion to  
18 dismiss or lift stay ECF No. 45.)

19 For the reasons stated on the record at a hearing on  
20 June 2nd, 2022, the Court partially lifted the automatic stay  
21 to allow the Mezz Lender to proceed with foreclosure of its  
22 ownership interests up to, but not including, any foreclosure  
23 sale. For these same reasons, which were -- which I will set  
24 forth in detail shortly, as opposed to the more-abbreviated  
25 version discussed on June 2nd, the Court now grants the Mezz

1 Lender's request to lift the automatic stay its in -- in its  
2 entirety pursuant to Section 362(d) of the Bankruptcy Code.

3 The essential grounds for lifting the automatic stay  
4 are that the Mezz Lender lacks adequate protection, as no post-  
5 petition payments have been made to the Mezz Lender, and  
6 there's a lack of equity in the Debtor's only asset, which is  
7 the stock of its subsidiary. So the background to this case is  
8 as follows.

9 BACKGROUND OF THE CASE

10 THE COURT: The Debtor's sole material asset is its  
11 ownership interests in a wholly owned non-Debtor subsidiary  
12 called "Hello Nostrand LLC." Hello Nostrand is the owner of  
13 real property located at 1580 Nostrand Avenue, in Brooklyn.  
14 Hello Nostrand acquired the property in 2014 for the purpose of  
15 constructing a multi-unit housing development. (See  
16 Declaration Pursuant to Local Rule 1007, paragraph 5, and ECF  
17 1-1, which is the First-Day Declaration.)

18 It was asserted at the time of the filing that "the  
19 property is vacant and generating no income." (See id.; see  
20 also, Monthly Operating Report, at part 1, ECF Nos. 15, 30 and  
21 36, which show no income.) The Debtor now asserts that there's  
22 a lease for the property that was entered into in March of  
23 2022, but it appears that income from that lease does not begin  
24 until March of 2023. (See Debtor's Third Amended Plan of  
25 Reorganization at 6, which is found at ECF No. 100.)

1 Hello Nostrand is the Borrower on four loans  
2 currently held by Nostrand Senior Lender LLC, all of which are  
3 secured by a first mortgage on the property, and which  
4 collectively I'll refer to as "the mortgage loans." As of the  
5 petition date, the Debtor estimated that the aggregate amount  
6 owed under the mortgage loans is approximately 64.6 million  
7 with interest and other charges continuing to accrue. (See  
8 Debtor's Opposition to Motion to Dismiss or Lift Stay, Exhibit  
9 B, ECF No. 65)

10 The Debtor is a Borrower on a mezzanine loan  
11 currently held by Mezz Lender in the original principal amount  
12 of \$3 million -- and that, I'm referring to as "the mezz loan,"  
13 and together with the mortgage loans, we'll refer to them  
14 collectively as "the loans" -- and which was secured by  
15 ownership interest of the Debtor in Hello Nostrand; that is the  
16 mezz loan. As of the petition date, the amount owed on the  
17 mezz loan was approximately 4.6 million.

18 The loans are also backed by guarantees given by Eli  
19 Karp, the Principal of the Debtor and Hello Nostrand. (See  
20 Schedule of Assets and Liabilities at Schedule H, ECF No. 6, as  
21 amended by ECF Nos. 19 and 43, through collectively "the  
22 Schedules.") Followed certain purported defaults by the Debtor  
23 and Hello Nostrand on the loan documents for the mortgage loan  
24 and the mezz loan, including: failure to maintain insurance on  
25 the property; and failure to make interest payments; and

1 failure to pay the principal upon maturity, the original  
2 Lenders of those loans began a non-judicial UCC Article 9  
3 foreclosure sale against the ownership interests.

4           The foreclosure sale was scheduled for September of  
5 2021, but in August of 2022, the Debtor and Hello Nostrand  
6 sought to enjoin the foreclosure sale in a New York State Court  
7 action. (See Hello Living Developer Nostrand LLC, et al.  
8 versus 5080 Nostrand Mezz LLC, et al.; Index No. 034885-2021  
9 New York Superior Court, filed August 17th, 2021, which is the  
10 foreclosure action.)

11           In that foreclosure action, the Debtor and Hello  
12 Nostrand sought injunctive relief to prevent the foreclosure  
13 sale from occurring, and also a declaratory judgment that,  
14 among other things, the ownership interests were not subject to  
15 sale in auction under Article 9 of the UCC.

16           In October of 2021, the state court denied the Debtor  
17 and Hello Nostrand's request and authorized the UCC foreclosure  
18 sale of the ownership interest on certain conditions and with  
19 court supervision. In accordance with these conditions, the  
20 sale was rescheduled for December 22nd, 2021.

21           On that -- the Debtor then filed this Chapter 11 case  
22 on December 21st, 2021, one day prior to the scheduled  
23 foreclosure sale. On March 8th, 2022, the mortgage loan was  
24 assigned to Nostrand Senior Lender LLC, the Senior Lender, and  
25 the mezz loan was reassigned to the Mezz Lender. The Debtor



owns only the ownership interests of Hello Nostrand; conducts no other business other than the membership interest ownership and describes itself in its petition therefore as a single-asset real estate debtor. (See Petition at page 2, ECF No. 1; see also Amended Petition at 2; see ECF No. 16.)

On January 4th, the Debtor filed its schedules, which were subsequently amended. The Debtor scheduled a total of five claims inclusive of the Mezz Lender's claim. The four other claims are: (1) Downstate Foot & Ankle Podiatry, has scheduled claims of some \$300,000; (b) Dr. Sumit Dharia, D-h-a-r-i-a, with a scheduled claim of some 175--; (3) Laser Mechlovitz (phonetic), with a scheduled claim of \$500,000; and (d) RH Equity New York LLC, with a scheduled claim of \$650,000.

The Mezz Lender has questioned whether these four scheduled claims are valid claims against the Debtor. In discovery, the Debtor produced what are asserted to be promissory notes for these Creditors in support of the assertion they are valid claims. (See Brody Declaration, Exhibits 4 through 7, which contain copies of the notes.)

Each of these Creditors is described in the notes as an investor. (See id.) Furthermore, each note states that the investor was shifting portions of its prior investment with Mr. Karp in other projects; i.e., not at the property, but other Karp-related-entity locations. (See id.; see also Karp Deposition Transcript, page 29, line 22 through page 31,

1 line 1.)

2           The Debtor did not prove countersigned copies of the  
3 note, even though the signature pages show that both parties  
4 were to sign the agreement to indicate acceptance of its terms  
5 and conditions. (See Declaration of Alan Brody in support of  
6 the Mezz Lender's Supplemental Object to Disclosure Statement,  
7 and Motion to Dismiss the Lift Stay, at Exhibits 4 through 7;  
8 that's ECF No. 85.)

9           In two instances, the investors under the notes  
10 agreed that the promissory notes -- promissory note was itself  
11 a buyout of its equity interest in Mr. Karp's other projects.  
12 (See Brody Declaration, Exhibits 6 and 7; see also Deposition  
13 Transcript of Eli Karp at page 66, line 6 through 16; page 105,  
14 line 23 through 10 -- page 106, line 2, on May 17th, 2022,  
15 which is the Karp Deposition attached as Exhibit 1 to the Brody  
16 Declaration.)

17           The promissory note with Mr. Mechlovitz changed  
18 during -- changed the duration and the interest rate of the  
19 investor's initial investment with the other Hello Living  
20 entity. (See Brody Declaration, Exhibit4; see also Karp  
21 Deposition Transcript at page 32, line 11s [sic] through 16;  
22 page 39, line 10 through page 40, line 19.)

23           Mr. Karp further testified that the Debtor received  
24 none of the monies referenced in the notes; but that the funds  
25 were instead transferred to accounts of Mr. Karp's various

1 other entities. And he subsequently transferred amounts from  
2 his personal account to Hello Nostrand there -- thereby  
3 skipping the Debtor. (See Karp Deposition Transcript at page  
4 35, line 13 through page 36, line 8; page 42, line 4 through  
5 page 44, line 5.)

6 With the bar date now having passed in the case,  
7 three other Creditors -- only three other Creditors -- other  
8 than Mezz Lender have filed proofs of claim. So there's Claim  
9 Number 1-1 of the IRS, for some \$3,000 in estimated partnership  
10 taxes, for the period of 2017 through 2020; Claim Number 2-1 of  
11 Hello Nostrand Holdings LLC or an entity I'll call "HNN," for  
12 some \$5,918,000 for an unsecured claim -- unsecured loan,  
13 excuse me; and last -- third but not last, finally Claim 3.1 of  
14 Magellan Concrete Structures Corporation, for some \$620,000,  
15 for materials sold and services rendered to Hello Nostrand.

16 The Court notes that HNN, that is the subject of  
17 Claim Number 2-1, is an indirect equity holder of the Debtor  
18 that owns approximately 13.95 percent of Hello Nostrand  
19 Investors LLC, or "HNI," which in turn, owns 100 percent of the  
20 equity of the Debtor. (See Amended Corporate Ownership  
21 Statement Pursuant to Rule 7007.1 at ECF No. 14, and Debtor's  
22 Disclosure Statement under Chapter 11 of the Bankruptcy Code,  
23 Exhibit B, ECF No. 41.)

24 HNN did not attach the loan or any documentation to  
25 support its assertion that its \$5.9 million claim is in fact a

1 claim against the Debtor as opposed to NHI or a capital  
2 contribution. In fact, the Debtor didn't schedule NH -- HNH on  
3 its schedules. The question therefore arises whether HNH has a  
4 claim as a Creditor against the Debtor. Additionally, it  
5 appears that Magellan is in fact a Creditor of Hello Nostrand  
6 and not the Debtor.

7           According to documents attached to Magellan's proof  
8 of claim is a subcontractor with Supreme Builders & Developers  
9 LLC, which is an entity of Mr. Karp, and it's a subcontractor  
10 of -- of Supreme Builders & Developers as a general contractor.  
11 (And see Magellan Proof of Claim, Standard Form of Agreement  
12 Between Contractor and Subcontractor, at page 1, to identify  
13 it's a contractor; page 20, identifying Eli Karp as the  
14 managing member of the Contractor; see also Affirmation of Eli  
15 Karp, dated January 24, 2022 at paragraph 1, ECF No. 22, which  
16 Mr. Karp states: "I am the Principal of Supreme Builders.")

17           Magellan asserts that it provided good [sic] and  
18 services under a subcontract agreement with Supreme Builders in  
19 relation to the property with Hello Nostrand as owner with an  
20 outstanding balance of some \$620,000.

21           On March 21st, 2022, the Debtor filed the Debtor's  
22 Plan of Reorganization under Chapter 11 of the Bankruptcy Code  
23 proposed by the Debtor. (See ECF No. 38.) On May 12th, 2022,  
24 an amended version of the disclosure statement and plan were  
25 filed, and they purport to pay all Creditors in full at some

1 discretionary point in the future, thus leaving equity  
2 unimpaired. The Debtor's source of income from -- a source of  
3 income would be from its subsidiary, Hello Nostrand, which it  
4 represents entered into a lease with a tenant entity supposedly  
5 formed on the petition date; and the Mezz Lender asserts it is  
6 somehow affiliated with the new manager of the property.

7           The Debtor then filed a Second Amended Disclosure  
8 Statement and Plan on May 20th, 2022, which provided an option  
9 to acquire the building on the property and return for release  
10 of their rights to the remainder of the property, including the  
11 vacant lot upon which the Debtor contemplates constructing an  
12 additional building some time in the future. (See amended --  
13 Second Amended Plan at pages 10 through 11.)

14           On May 31st, 2022, the Debtor filed a Third Amended  
15 Plan and Disclosure Statement, which provided that an  
16 unidentified third buyout of the Mezz Lender in return for 40  
17 percent investment interest in the Debtor's property at the  
18 property site. (See Debtor's Third Amended Plan of  
19 Reorganization at pages 8 through 9, ECF No. 100.) At a  
20 hearing held on June 2nd, 2022, the Mezz Lender noted that this  
21 third party and the source of these funds remain unidentified.

22           In light of all that background, the Mezz Lender now  
23 seeks to have the Chapter 11 case dismissed, or have the  
24 automatic stay lifted in full so the Mezz Lender can proceed  
25 with its UCC foreclosure sale. As explained at the prior

1 hearing, the Mezz Lender believes that it is appropriate now to  
2 lift the stay completely, and that not doing so at this point  
3 will impair the ability to conduct the UCC foreclosure sale to  
4 maximize the value.

5           The Mezz Lender makes several assertions in its  
6 motions, including that there's no equity in the Mezz Lender's  
7 collateral; that is, the ownership interest in that the Debtor  
8 has no realistic chance of reorganization. And the Mezz Lender  
9 also asserts there's an ongoing diminution of the property of  
10 the estate and that it lacks adequate protection.

11           So turning now to legal standards, Section 362(d) of  
12 the Bankruptcy Code provides in relevant part the following:

13           "On request of a party in interest, and after  
14 noticing a hearing, the court shall grant relief from the  
15 stay...

16           (1) for cause, including the lack of adequate  
17 protection of an interest in property of such party in  
18 interest; or

19           (2) with respect to a stay of an act against property  
20 under subsection (a) of this section, if—

21           (A) the debtor does not have an equity in such  
22 property; and

23           (B) such property is not necessary to an effective  
24 reorganization."

25 And that's all 11 U.S.C. section 362(d) (1).

1 Section 362(d)(1), when evaluating a motion to lift  
2 under that section, courts often use the following 12-factor  
3 tests set forth by the Second Circuit in In re Sonnax  
4 Industries, 907 F.2d 1280 (2d. Cir. at 1990)

5 The 12 factors are [as follows]: (1) whether relief  
6 would result in partial and complete resolution of the issues;  
7 (2) whether any connection with or interference with the  
8 bankruptcy case; (3) whether the other proceeding involves the  
9 debtor as a fiduciary; (4) whether a specialized tribunal with  
10 the necessary expertise has been established to hear the cause  
11 of action; (5) whether debtor's insurer has assumed full  
12 responsibility for defending it; (6) whether the action  
13 primarily involves third parties; (7) whether litigation in  
14 another forum would prejudice the interests of other creditors;  
15 (8) whether the judgment claim arising from other action is  
16 subject to equitable subordination; (9) whether movant's  
17 success in the other proceeding would result in a judicial lien  
18 avoidable by the debtor; (10) the interests of judicial economy  
19 and an expeditious and economical resolution of litigation;  
20 (11) whether the parties are ready for trial in the other  
21 proceeding; and (12) the impact of the stay on the parties and  
22 the balance of harms." See Sonnax Industries at page 1286.

23 The decision of whether to lift a stay is entirely  
24 within the discretion of the Court, and the Court need only  
25 consider the relevant factors, and that is the relevant Sonnax

1 factors in making its determination. (See In re Sonnax  
2 Industries, 907 F.2d 1286; see Mazzeo v. Lenhart, 167 F.3d 139  
3 at 143 (2d. 1999).)

4 In deciding whether to lift the stay and allow a  
5 creditor to continue in litigation in another forum, the  
6 bankruptcy court should consider the particular circumstances  
7 of the case and ascertained what is just to the claimants, the  
8 debtor and the estate, in In re Touloumis, 170 B.R. 825, 828  
9 (Bankr. S.D.N.Y. 1994), indeed causes a broad and flexible  
10 concept that must be determined on a case-by-case basis.  
11 (Spencer v. Bogdanovich, 292 F.3d 104 at 110 (2d. Cir. 2002),  
12 citing In re Mazzeo, 167 F.3d at 143.)

13 The burden of proof on a motion to lift or modify the  
14 automatic stay is a shifting one. (See In re Sonnax, 907 F.2d  
15 1285.) Section 362(d)(1) requires an initial showing of cause  
16 by the movant; while Section 362(g) places the burden of proof  
17 on the debtor on all issues other than the debtor's equity in  
18 property. (In re Sonnax, 907 F.2d at 1285.) But in the event  
19 the movant fails to make an initial showing of cause, the court  
20 should deny relief without requiring a showing from the debtor  
21 that it is entitled to continued protection.

22 Another factor that relates to whether cause exists  
23 to lift the automatic stay is whether the creditor lacks  
24 automatic -- I'm sorry -- adequate protection. A prima facie  
25 case that a party lacks adequate protection under Section



1 362(d)(1) could be satisfied by showing: (1) a qualitative  
2 decline in value of the property; or (2) that a debtor's failed  
3 to make numerous post-petition bankruptcy payments. (See In re  
4 Garcia, 584 B.R. 483 at 488 (Bankr. S.D.N.Y.).)

5 Courts also make a determination of adequate  
6 protection by examining whether there is equity in the  
7 property. (See id. at 489.) An equity -- but an equity  
8 cushion in property must be of some significance to constitute  
9 adequate protection (see id., citing In re Rory (phonetic) 98  
10 B.R. 215 and 221 (Bankr. E.D.N.Y. 1989) in which that Court  
11 stated:

12 "In determining whether an equity cushion provides  
13 adequate protection, the court considers factors such as the  
14 size of the cushion, the rate at which the cushion will be  
15 eroded, and whether periodic payments are to be made to prevent  
16 or mitigate the erosion of the cushion."

17 And in that case, holding an equity cushion valued at  
18 42 percent of the claim was sufficient to provide adequate  
19 protection. (See also In re McKillips, that's  
20 M-c-K-i-l-l-i-p-s, 81 B.R. 454 at 458, (Bankr. N.D. Ill. 1987.)  
21 And that case explained that an equity cushion of 20 or more  
22 percent constitutes adequate protection; while an equity  
23 cushion under 11 percent is insufficient to provide adequate  
24 protection. See also In re James River Associates, 148 B.R.  
25 790 at 796, (E.D. Va. 1992.) The case holding that a 2 percent

1 equity cushion is insufficient to provide adequate protection  
2 because the deterioration of the equity cushion from  
3 accumulating interests.

4 Applying all these principles here, the Court finds  
5 cause exists to lift the automatic stay under Section  
6 362(d)(1). To start with, cause exists pursuant to the Sonnax  
7 factors. These factors that are relevant to this case clearly  
8 outweigh -- clearly weigh in favor of the Mezz Lender.

9 With respect to the first and seventh factors,  
10 allowing a foreclosure sale to proceed would result in a  
11 complete resolution of the issues between the Debtor and the  
12 Mezz Lender, which is the main dispute -- in fact, seems to be  
13 the only dispute -- that has been addressed in the Debtor's  
14 bankruptcy case. And thus, there would seem to be no prejudice  
15 to the few remaining Creditors of the Debtors itself,  
16 especially given the legitimacy of -- of which is in question  
17 for several of those claims.

18 With respect to the second Sonnax factor, courts  
19 frequently consider whether lifting the stay might invite  
20 similar motions from similarly situated creditors. (See In re  
21 Artisanal 2015, LLC, 2017 Bankr. LEXIS 3813, at \*47 (Bankr.  
22 S.D.N.Y Nov. 3rd, 2017). See In re Northwest Airlines Corp.,  
23 2006 Bankr. LEXIS 2515, at \*5, (Bankr. S.D.N.Y Mar. 10th, 20 --  
24 2009) which describes the concern that lifting the automatic  
25 stay to allow an antitrust action would open the floodgates for

1 similar motions and causes -- and caused the debtor to refocus  
2 their energy on litigation for other courts rather than emerge  
3 from Chapter 11.

4 In this case, no such debt exists here because as of  
5 the petition date, the Mezz Lender is the only Creditor with a  
6 security interest in the ownership interest, and in fact the  
7 Debtor's only Secured Creditor.

8 As to the fourth Sonnax factor, the state court  
9 clearly had the expertise to address any foreclosure issues or  
10 property dispute. See, e.g., In re Residential Capital LLC  
11 2012 Westlaw 3423285 at \*7, (Bankr. S.D.N.Y Aug. 14th, 2012)  
12 noting that the state court is in the best position to address  
13 state law defenses to foreclosure.

14 The ninth Sonnax factor also weighs in favor of  
15 lifting the stay, as the Mezz Lender already has a consensual  
16 lien on the ownership interest, and the Article 9 foreclosure  
17 sale will not result in any judicial lien avoidable by the  
18 Debtor.

19 The 10th and 11th Sonnax factors also weigh in favor  
20 of the stay. The state court has familiarity with the issues,  
21 having previously presided over the foreclosure action, and any  
22 remaining matters regarding the foreclosure would presumably be  
23 resolved fairly quickly as the state court has already entered  
24 an order providing for the UCC foreclosure sale, which was  
25 ready to be conducted and closed promptly.

1 See, e.g., In re Cicale, that's C-i-c-a-l-e, 2007  
2 Westlaw 1893301 at \*4, (Bankr. S.D.N.Y Jun. 29th, 2007) a case  
3 that notes that allowing litigation to proceed in state court:  
4 "will provide the most efficient economic resolution of the  
5 litigation, because the action may alleviate the need for  
6 further proceedings in the bankruptcy court."

7 With respect to the 12th Sonnax factor, the impact of  
8 the stay on the parties and the balance of the harm, and that  
9 is somewhat of an equipoise: on the one hand, it certainly  
10 will impact the Debtor's case; on the other hand, there is an  
11 issue of the various defaults under the loan. (See, e.g.,  
12 Thompson v. JPMorgan Chase Bank NA, 2012 Westlaw 739384 at \*6,  
13 (E.D.N.Y Bank -- I'm sorry, E.D.N.Y. Mar. 8th, 2012.)

14 A court considering the Sonnax factors and finding  
15 cause where the debtor was not making mortgage payments, the  
16 secured creditor begun foreclosure proceedings in the state  
17 court and the secured creditor continued to expend money for  
18 taxes and insurance on the property in question.

19 As discussed below, there is lack of adequate  
20 protection on the part of Mezz Lender. The Mezz Lender has not  
21 been receiving post-petition payments. And furthermore, as  
22 discussed below, there is no equity in the ownership interest;  
23 and it appears the Debtor has no prospect of a successful  
24 reorganization based on the plan that's been put forward in the  
25 case.

1 So, the segues to a discussion under Section  
2 362(d)(2) which provides: the stated relief must be granted if  
3 the debtor does not have equity in the subject property and  
4 such property is not necessary to an effective reorganization.  
5 And to establish a prima facie cause for lifting the automatic  
6 stay under 362(d)(2), the movant must show: the amount of its  
7 claim; that its claim is secured by a valid perfected lien in  
8 the property of the estate; and that the debtor lacks equity in  
9 the property. (See In re Kaplan Breslaw Ash, 3 -- I'm sorry --  
10 264 B.R. at 322.)

11 Under Section 362(d)(2), equity means the difference  
12 between the value of the property and the total amount of  
13 claims that it secures. (See id.) Courts use simple  
14 arithmetic to calculate the equity on the property:  
15 subtracting total claims from the value of the property. The  
16 value of the claims against the property exceed the value of  
17 the property, and the Debtor has no equity. See In re  
18 Robinson, 2019 Bankr. LEXIS 103 at \*5 through 6, (Bankr.  
19 S.D.N.Y. Jan. 11th, 2019) which is actually citing 3 Collier on  
20 Bankruptcy paragraph 362.07(4)(a).

21 The Supreme Court, in United States Association of  
22 Texas v. Timbers of Inwood Forest Associates, set forth the  
23 standard for necessary for effective reorganization under  
24 Section 362(d)(2). And it stated in sum and substance, once a  
25 movant under Section 362(d) establishes that he is an under-

1 secured creditor, it is in the burden of the debtor to  
2 establish that collateral issue is necessary to an effective  
3 reorganization. What this requires is not merely a showing  
4 that if there needed -- that there be a need for it, but the  
5 property is essential for an effective reorganization that is  
6 in prospect. That means that there must be a reasonable  
7 possibility of a successful reorganization within a reasonable  
8 time. (See 384 U.S., 365 at 375 through pages 76, a Supreme  
9 Court case from 1988.)

10 The burden rests on the debtor to show an effective  
11 reorganization "is in prospect" and that there is a reasonable  
12 possibility of a successful reorganization within a reasonable  
13 time. (See id.)

14 As previously noted, the Court finds the Mezz Lender  
15 lacks adequate protection, and the Debtor lacks equity in the  
16 ownership interest. The Mezz Lender asserts that the loan has  
17 matured and it's in default. In a hearing on June 2nd, 2022,  
18 the Mezz Lender stated that there have been no post-petitions  
19 [sic] made on the mezz loan or the mortgage.

20 Additionally, the Mezz Lender is secured by its  
21 interest in the ownership interests. The value of that  
22 ownership interest derived from the equity value of Hello  
23 Nostrand, thus any analysis of value and equity must take into  
24 account all liabilities owned by Hello Nostrand.

25 So to begin that analysis, the total amount of the

1 Mezz Lender's claim as of the petition date is at least 3 --  
2 \$4,365,000. In the proposed disclosure statement, liquidated  
3 -- liquidation analysis attached as Exhibit D by the Debtor,  
4 the Debtor states that the ownership interests are worth \$3  
5 million, which is not sufficient to cover the balance of the  
6 mezz loan. See Proposed Disclosure Statement at paragraphs 43  
7 and 44, which states:

8           "The liquidation analysis assumes the liquidation  
9 sale of the debtor's asset was a result in there being  
10 insufficient funds to pay the Secured Creditor even if the  
11 Secured Creditors were allowed, much less other junior claims.  
12 This leaves an equity deficiency of no less than 1.65 million."

13           Furthermore, as discussed at the hearing on the Mezz  
14 Lender's motion, even using the Debtor's numbers, regarding the  
15 property, results in a lack of equity of the ownership  
16 interest. And the starting point analysis is the \$71.5 million  
17 valuation reflected in appraisal of the property provided by  
18 the Debtor that took place on March 9th, 2020. (See Exhibit A,  
19 Periodic Report regarding value, operations, and profitability  
20 of NH, in which the Debtor's estate holds a substantial and  
21 controlling interest. (That's at ECF No. 28.)

22           The appraisal includes the property in the existing  
23 building and that is on the property. Despite the Debtor's  
24 urging that the Court take into account the hypothetical second  
25 building, the Court is going to rejected that request.

1 Considering such a hypothetical second building would be  
2 entirely inappropriate given that there's no financing in place  
3 for such construction, and no construction has even started on  
4 such a second building.

5           Indeed, as the Court the noted at the hearing, the  
6 valuation provided the debt -- by the Debtor included the  
7 current improved property; and thus, I gave a holistic view of  
8 the entire value of the property as it is now making the  
9 Debtor's position about a second building at odds with its own  
10 valuation.

11           So when looking at the equity that the Debtor holds  
12 in Hello Nostrand, you must look at the value of the assets  
13 minus the value of all liabilities. As a -- as an appraisal of  
14 the property, this dollar amount would have -- have to include  
15 the liabilities of Hello Nostrand against that appraisal.

16           So in examining those liabilities, you start with the  
17 mortgage debt, which is listed by the Debtor itself at \$69.1  
18 million as of the petition date of December 21st, 2021. (See  
19 Debtor's Opposition to Motion to Dismiss from Lift Stay Exhibit  
20 B and ECF 65.) The mezz loan is listed by the Debtors at 4.5  
21 million on that date. (See Debtor's Opposition, Exhibit B.)  
22 Subtracting this amount, would leave \$64.6 million of mortgage  
23 debt as of December 2021.

24           Additionally, the mortgage is accruing interest at  
25 approximately \$1 million a month, a figure that has not been



1 challenged. (See Declaration of Jeffrey Simpson in support of  
2 the Motion to Dismiss, or Alternatively for Stay Relief, at  
3 paragraph 34; see ECF No. 47.) This means that there's at  
4 least an additional \$5 million of interest that has accrued  
5 since December of 2021. So taking the \$71.5 million valuation  
6 of the Debtor, subtracting \$64.6 million as the value of the  
7 mortgage loan, along with an additional \$5 million interest,  
8 that would leave approximately \$2 million in value.

9 And as discussed at the prior hearing, there's at  
10 least \$1.6 million in mechanics liens on the property itself,  
11 which leaves \$400,000 in value of Hello Nostrand. This value  
12 has most likely been, or will be soon, completely subsumed by  
13 the \$1 million in interest accruing every month as against the  
14 mortgage loan. And thus, leaves a negative value of the equity  
15 held by the Debtor in Hello Nostrand, which is the collateral  
16 held by the Mezz Lender. This can be balanced against the \$4.6  
17 million, too, by the Debtor to the Mezz Lender on the mezz  
18 loan.

19 While the Court need go no further on that valuation  
20 analysis, there is also an issue of another \$5.6 million in  
21 unsecured claims listed on Exhibit A to the Debtor's petition.  
22 (See Exhibit A to the Debtor's Petition.) While this exhibit  
23 purports to list liabilities of the Debtor and Hello Nostrand,  
24 the Mezz Lender asserts that these are in fact liabilities of  
25 Hello -- Hello Nostrand. If these amounts were subtracted,

1 they would leave a negative value of \$5.2 million, and not even  
2 including any broker fees for the lease of Hello Nostrand at  
3 the property level, or the attorneys' fees that have been  
4 approved.

5 In addition, the Court notes, consistent with the  
6 Supreme Court's guidance in Timbers of Inwood Forest, that  
7 there is no evidence -- well, the Debtor has not satisfied its  
8 requirement of showing an effective reorganization in prospect  
9 here based on the Debtor's own filed proposed plan of  
10 reorganization; and that there is not a reasonable possibility  
11 of a successful reorganization within a reasonable time.

12 Such a reorganization appears unlikely, given that  
13 the Debtor does not appear to have the necessary votes to  
14 confirm its proposed plan, despite weeks of attempted  
15 negotiations with the Mezz Lenders, raising an issue under  
16 Section 1129(a) of the Bankruptcy Code.

17 In addition, in considering this case and this  
18 motion, several cases in this jurisdiction note that the  
19 standards establishing cause for dismissal under 1112(b) of the  
20 Bankruptcy Code are similar to those for granting relief from  
21 the automatic stay under 362(d)(1). See In re 234-6 West 22nd  
22 Street Corporation, 214 B.R. at 751, 757 (Bankr. S.D.N.Y.  
23 1997), a case which states:

24 In the context of a motion either to dismiss a  
25 Chapter 11 case under 1112(b) or to lift the stay under

1 362(d)(1), the standards of bad -- bad faith is evidence of  
2 cause are not substantially different from one another. (See  
3 also In re Kaplan Breslaw Ash LLC 3 -- 264 B.R. 309 and 334  
4 (Bankr. S.D.N.Y. (2001); see also Inwood Heights Housing  
5 Development Fund Corporation, 2011 Westlaw 3793324 at \*20-21 --  
6 I'm sorry, 20-26, (Bankr. S.D.N.Y. Aug. 25th, 2011) which also  
7 notes the standards are similar.) (See also In re Balco, Ltd.,  
8 312 B.R. 734 at 752 (Bankr. S.D.N.Y. 2004), finding cause to  
9 modify the stay where there was no prospect -- reorganization  
10 in prospect.)

11 So here, cause for a dismissal is in fact a fact-  
12 specific inquiry that includes a variety of factors, including  
13 the purpose for which the petition was filed; and whether state  
14 court proceedings adequately protect the party's interest.  
15 (See Wilk Auslander LLP v. Murray, 900 F.3d 53 at page 60 (2d.  
16 Cir. 2018).)

17 For instance, the Second Circuit has upheld dismissal  
18 for cause under Section 1112(b) where the filing was latest in  
19 a two-party dispute, and could be fully resolved in a  
20 bankruptcy forum; and where the primary function of the  
21 petition was to serve as the litigation tactic. (See id.,  
22 citing In re C-TC Ninth Avenue Partnership, 113 F.3d at 1304,  
23 pp. 1309-1310, (2d. Cir. 1997).) And a two-party dispute  
24 involves a Creditor and a Debtor with no other imminent threats  
25 from other Creditors. (See In Midway Investment, Ltd., 187

1 B.R. 382 and 388 (Bankr. S.D. Fla. 1995).) Midway, the Debtor,  
2 operated a shopping center, and the creditor held a mortgage on  
3 the center. (See id., at 386)

4 The Court found it was plainly a two-party dispute  
5 because Midway faced no other imminent threat from other  
6 creditors, and that its only other pending dispute involved  
7 claims brought by Midway against two tenants. (See id., at  
8 388; see also PPI Enterprises 22 B.R. at 339, p. 345 (Bankr. D.  
9 of Del. (1998).) In that case, concluding that a two-party  
10 dispute consists of a case between a debtor with a single asset  
11 and the secured creditor holding a secured interest in that  
12 asset.

13 In the case of In re Murray, the Second Circuit noted  
14 that a case which involves only one creditor, and no risk of  
15 asset depletion in favor of other creditors, is a two-party  
16 dispute. (See In re Murray, 900 F.3d at 61.) The Court of  
17 Appeals in that case noted the filing was simply part of a  
18 long-running two-party dispute. There were no other creditors  
19 to protect.

20 They've been brought solely as a judgment enforcement  
21 device for which adequate remedies existed in state law, and  
22 that the debtor did not want or need to discharge, and there  
23 were no other goals in the bankruptcy such as pari-passu  
24 distribution among competing creditors that would be served by  
25 continuing the petition. (See id.)

1           Additionally, in that case, the court noted the  
2 debtor could not show that it would be substantially prejudiced  
3 by relying on mere remedies, and that the interest of the  
4 Debtor in the bankruptcy system as a whole would be advanced if  
5 the case were dismissed. (See id.)

6           The Court of Appeals found that the parties'  
7 preference for bankruptcy remedies to solve a two-party dispute  
8 could not outweigh the lack of any other bankruptcy-related  
9 purpose and constituted cause for dismissal. (See id.; see  
10 also In re Bos, 561 B.R. 868 at p. 901, (Bankr. N.D. Fla.  
11 (2016) noting that in a two-party dispute, even if the creditor  
12 wanted to pursue bankruptcy remedies, the availability of the  
13 state forum supported dismissal.

14           And other courts have held that a two-party dispute  
15 is better resolvable in state court because the liquidation of  
16 the debtor's assets in bankruptcy would not produce any benefit  
17 nor realizable outside bankruptcy. (See In re JER/Jameson Mezz  
18 Borrower II LLC., 461 B.R. 293 at 295, (Bankr. D. of Del.,  
19 2011).)

20           So, the court notes that in fact this case is  
21 essentially a two-party dispute; whether the Creditors listed  
22 on the Debtor's petition are truly Creditors of the Debtor is  
23 disputed by the Mezz Lender. And in fact, there's evidence to  
24 suggest they're not. But of more significance in this Court's  
25 analysis is whether to -- lifting the stay on the -- is whether

1 the bankruptcy filing was precipitated by a dispute of the  
2 Debtor over foreclosure of the property, which in fact it was.  
3 (See First-Day Declaration, at paragraph 1, the filing by the  
4 parent was done to stay the UCC Mezz Lender's -- to stay the  
5 UCC mezz loan of \$3 million principal foreclosure.)

6 Since the bankruptcy filing, the case has been driven  
7 solely by the dispute between the Debtor and the Mezz Lender;  
8 no other Creditors have even appeared at hearings in this case.  
9 Whatever rights the Debtor has, these canons should be pursued  
10 in state court as opposed to continuing to drain the estate by  
11 accumulating huge administrative costs litigating these issues  
12 in Chapter 11.

13 So, the Court notes that when it was first presented  
14 with the Mezz Lender's motion to lift the automatic stay or to  
15 dismiss the case, the Court opted to consider stay relief,  
16 given the Debtor's professed desire to have time to negotiate  
17 with the Mezz Lender. Such negotiations are common in  
18 bankruptcy are -- are encouraged.

19 The Court can understand a debtor's desire to have  
20 time to negotiate with its creditors. But such negotiations  
21 are not a substitute for satisfying the requirements in the  
22 bankruptcy case -- I'm sorry the Bankruptcy Code for making a  
23 case work; nor can it cure the desire to negotiate -- I'm sorry  
24 -- nor can the desire to negotiate be used an indefinite shield  
25 by a debtor as against a creditor's rights under the code,

1 particularly, where there's been no post-petition payments and  
2 where there's no adequate protection of the -- of the secured  
3 creditor.

4           The Court notes the Debtor filed a letter dated  
5 January -- I'm sorry -- July 11 in anticipation of today's  
6 bench ruling. But the letter itself is another attempt to  
7 conduct negotiations on the public docket stating what they --  
8 the Debtor is willing to do "to resolve the case," and that's  
9 not how bankruptcy works. While courts encourage negotiations,  
10 we don't put our finger on the scale of parties' negotiations,  
11 which is what the letter appears to seek. (See Federal Rule of  
12 Evidence 408.)

13           So given all those circumstances, this case is in the  
14 end a fairly simple set of facts. That is, the lack of  
15 adequate protection of the Mezz Lender's secured interest,  
16 given the value of the property and the lack of post-petition  
17 payments, and that's coupled with the failure to present any  
18 reasonable prospect of reorganization other than essentially  
19 conclusory statements about the payment and complete payment of  
20 -- of all claims, which -- which does not make for a feasible  
21 plan. It's -- it's makes only for an aspirational plan, which  
22 is insufficient for purposes of the code and for purposes of  
23 today's motion.

24           So given all those reasons, the Court will lift the  
25 stay completely. Again, I think there's grounds to dismiss the

1 case. I have understood that it is the Debtor's preference to  
2 proceed by lifting the automatic stay rather than dismissing  
3 the case. In the event that there's some other bankruptcy  
4 purpose that can be somehow pulled from what is -- is still  
5 here, or to the extent that there's some sort of agreement  
6 that's reached in the course of state court proceedings that  
7 allows a bankruptcy to flourish.

8 So, that's why I'm lifting the stay in full rather  
9 than dismissing the case at this time. Of course if the Debtor  
10 believes that there's really no purpose left, in light of  
11 lifting the stay in its entirety, then the alternative remedy  
12 of dismissal would also be appropriate. That's the Court's --

13 MR. KARP: (Inaudible) --

14 THE COURT: -- ruling, and I'd ask the Debtor -- I  
15 mean, I'm sorry -- I'd ask the Movant to submit a proposed  
16 order to grant the motion to lift the automatic stay in full  
17 for the reasons set forth on the record.

18 So with that, let me ask the Debtor, if there's  
19 anything else to address at today's hearing?

20 DEBTOR'S REQUEST FOR DISMISSAL AND STATEMENT RE SAME

21 MR. KARP: Yes, Your Honor. If -- if -- if it's  
22 over, then I would like to close the -- the case. The  
23 chapter --

24 THE COURT: All right --

25 MR. KARP: -- if it's -- if it's over, it's over.



1 THE COURT: All right. Mister -- Mr. Fox, what are  
2 -- that's your client speaking. If you wanna chance to talk to  
3 your client after today's ruling, I -- I -- I understand that,  
4 and that's an entirely appropriate thing to do. And if you  
5 wanna do that and then touch base with Mr. Muchnik as to  
6 whether the order that he should submit should be a -- a order  
7 to lift the stay in its entirety or to dismiss the action.

8 If it's to dismiss, it would be helpful to have  
9 something on the record so that I know that that's clearly the  
10 preference. I think that would be -- that kind of clarity  
11 would be preferable for all parties involved. So, does that  
12 makes sense to you, Mr. Fox?

13 DEBTOR'S COUNSEL STATEMENT RE CLIENT'S REQUEST FOR DISMISSAL

14 MR. FOX: It -- it does, Your Honor. Leo Fox. I  
15 think that my client has spoken. He certainly has reasonable  
16 grounds. I think the Court had indicated has reasonable  
17 grounds, and the fight's over; the battle is -- is completed.  
18 And we would then ask Your Honor that the case be dismissed.  
19 There's no good grounds or good reason to keep the case open.

20 I just don't see the reason. I think the U.S.  
21 Trustee raised it the last time as well. Your Honor, we did  
22 the best we could. It wasn't sufficient, and I think that the  
23 case is over and should be dismissed.

24 THE COURT: All right. Mr. Muchnik, I assume that  
25 that's -- that result is something that is consistent with your

1 client's motion?

2 MR. MUCHNIK: Yes, Your Honor. And we'll --

3 THE COURT: All right.

4 MR. MUCHNIK: -- we'll talk to Mr. Fox, and we'll  
5 submit a -- a -- an order under certification.

6 THE COURT: All right. And let me just hear from the  
7 U.S. Trustee Office to finally wrap things up.

8 U.S. TRUSTEE'S COMMENTS REGARDING ORDER AND OUTSTANDING FEES

9 MS. TIAN TIAN: Ms. Tiantian, for the United States  
10 Trustee. I would love to be included in the circulation of the  
11 proposed order. The Debtor currently owes the U.S. Trustee a  
12 small amount, about \$250 in UST fees, and the order should  
13 provide for payment of that fee within a certain period of  
14 time; it's usually 10 days. I would just love to be included  
15 in the circulation of the proposed order. Thanks.

16 MR. MUCHNIK: I'll send it (inaudible) --

17 THE COURT: All right.

18 MR. FOX: As I will, too, Your Honor.

19 THE COURT: All right. So, Mr. Muchnik will  
20 circulate an order based on canvassing the room at this time.  
21 I understand that the result that is preferred as among those  
22 two options is dismissal and that that's what the order will  
23 be. If for some reason that result changes, then I will expect  
24 the order to -- submitted to reflect a lifting of the stay in  
25 its entirety.

July 12, 2022

1 If -- if something -- I -- rather than make you take  
2 an extra step, Mr. Fox, and spend the time and money of filing  
3 something on the docket, I assume it's safe to state -- take  
4 your statement and your client's statement on the record to  
5 mean that as of now the request is dismissal, and I don't --  
6 and that you're not -- you -- you don't have the need to  
7 consult; is that right?

8 DEBTOR'S COUNSEL REAFFIRMS CONSENT TO DISMISSAL

9 MR. FOX: That's correct, Your Honor. The record  
10 should reflect that the Debtor has consented to a dismissal.

11 THE COURT: All right. All right. So I'm gonna so  
12 order the record. And I'll ask Mr. Muchnik to, again, to  
13 circulate that order. And then we will -- we will get it  
14 entered. And with that, is there any other business to address  
15 here this afternoon?

16 MR. FOX: Your Honor, we thank you for all the  
17 efforts you've made in the case. And we appreciate the fact  
18 that you spent the time to -- to go through this case, and  
19 afford the Debtor the opportunity that you did. And we hope  
20 that you feel 100 percent, according to Mr. Muchnik's  
21 comments --

22 THE COURT: Well, well, thank you. I --

23 MR. FOX: -- (inaudible).

24 THE COURT: -- I appreciate the -- the good wishes.  
25 I -- I did finally get my -- get-out-of-jail-free card which is

1 the one -- the one stripe. So it took longer than I would  
2 like, but thank you for your good wishes. And I appreciate --  
3 we've had a lot of hearings in this case, which puts a burden  
4 on Counsel; it puts a burden on clients. We all wanna see  
5 cases work, and -- and commercial solutions in cases work.  
6 Sometimes that happens; sometimes it doesn't. But that's the  
7 -- that's sort of my theory in having all these conferences.  
8 But I know that -- that does put a burden on you all, so I  
9 appreciate everybody making the time and effort to do that so  
10 that at least we have a process that's designed to maximize the  
11 possibility of cases working for the benefit of all  
12 stakeholders.

13 So -- so I appreciate that. And I certainly do  
14 appreciate the extra hearing or two that resulted from the joy  
15 that is, the pandemic, and your all -- your flexibility to roll  
16 with that. So thank you very much. And with that, the  
17 business of the Court being concluded today, the Court is in  
18 recess. Thank you all very much. Be well, and have a good  
19 evening.

20 MR. FOX: You, too, Your Honor. Thank you.

21 (Proceeding adjourned at 4:20 p.m.)

22 oOo

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## CERTIFICATION

1  
2 I, Catherine M. Griffin, certify that the foregoing  
3 transcript of proceedings is a true and accurate record of the  
4 proceedings.

5  
6 *Catherine M. Griffin*

Date: July 16, 2022

7 AMERICAN LEGAL TRANSCRIPTION

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9 Poughkeepsie, New York 12601  
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